INTRODUCTION

Recently, Bill Gates paid a much-anticipated visit to New Delhi, India, to speak with some of the country’s richest corporate entrepreneurs.¹ His visit, however, was not intended to inspire technological innovation;

rather, Gates visited India to echo the philanthropic sentiment expressed in his 2008 speech at the Davos World Economic Forum. In that speech, he challenged an audience full of the world’s leading businessmen and thinkers, claiming:

The world is getting better, but it's not getting better fast enough, and it's not getting better for everyone. The great advances in the world have often aggravated the inequities in the world. The least needy see the most improvement, and the most needy get the least—in particular the billion people who live on less than a dollar a day.2

Gates then called governments and entrepreneurs to action. He exhorted business leaders to apply their innovative capacities to problems in developing countries like malaria and lack of infrastructure.3 He implored governments to facilitate business contributions by granting companies economic and regulatory incentives to contribute to development.4 Moreover, he asked companies and governments to work together to harness the power of the market to produce goods for those who cannot pay.5 In doing so, he echoed Adam Smith’s observation that “there are evidently some principles in [man’s] nature, which interest him in the fortunes of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.”6 Corporations, in Gate’s view, need not be heartless; since the poor often cannot pay for innovation, though, governments and companies must work together to create the right mix of regulatory, economic, and reputational incentives to make industry work for everyone, not simply the wealthy.7

In bringing his message to India, Gates may not have realized that he was entering a heated debate on the Indian government’s role in fostering philanthropy and corporate social responsibility (“CSR”). In early 2011, as Gates was speaking in New Delhi, India’s parliament was pushing forward with the first major overhaul of India’s Companies Bill in over fifty years. When passed, the Bill will mark the first major revision to the Act governing Indian corporate law since India became an independent

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3 See id.

4 See id.

5 See id.


7 See Gates, supra note 2.
country in 1947.\textsuperscript{8} In the 2009 version of the proposed bill, which was pending in early 2011 as Gates paid his visit, India’s new Minister of Corporate Affairs inserted a section mandating CSR spending for companies operating in India.\textsuperscript{9} For companies exceeding a certain size, two percent of each year’s profits, averaged over the past three years, would be required to go toward socially responsible initiatives. Strangely, the bill did not define CSR for the purposes of expenditures. Instead, it allowed companies to formulate their own plans for CSR spending, but demanded that they report their expenditures on a yearly basis to ensure compliance.\textsuperscript{10} The Ministry acknowledged that this was likely the first time in history that a government had entertained the idea of mandatory CSR \textit{spending} for the majority of companies—although other governments have instituted mandatory CSR reporting.\textsuperscript{11}

As the preeminent spokesperson for voluntary philanthropy, Gates was warmly received by India’s corporate giants,\textsuperscript{12} perhaps as a welcome contrast to the government’s new aggressive CSR agenda. Due to governmental and popular pressure, change in corporate responsibility appears imminent in India; the question is merely what kind of change will transpire. According to the media, many Indians are growing restless and even bitter over the lack of societal contribution shown by India Inc.\textsuperscript{13} (the media’s term for India’s corporate sector, including both national companies and Indian branches of multinational enterprises). \textit{Forbes}

\footnotesize\begin{itemize}
\item \textsuperscript{9} See Standing Committee on Finance, Twenty-First Report (The Companies Bill, 2009), Lok Sabha, cl. 49, \textit{available at} http://www.prsindia.org/uploads/media/Companies\textunderscore%20Bill\textunderscore%202009.pdf.
\item \textsuperscript{10} See id.
\item \textsuperscript{11} Id. at cl. 120 (9.45) (“This is the first time and historically it may be the first time in the world [that a country has written] in the law itself that every company beyond the certain limit should have a corporate social responsibility policy.”).
\item \textsuperscript{12} See Karmali, \textit{supra} note 1.
\item \textsuperscript{13} See 2\% CSR Spend on Cards for India Inc., \textit{INDIA EXPRESS}, Feb. 9, 2011, http://www.indianexpress.com/news/2-csr-spend-on-cards-for-india-inc/747860/0 (“India Inc may not be able to shy away from their responsibility towards the society any more.”); Viji Sundaram, \textit{Vinod Khosla To Donate Half His Fortune to Charity}, \textit{NEW AMERICA MEDIA} (May 18, 2011, 12:42 PM), http://ethnoblog.newamerica.media/2011/05/vinod-khosla-to-donate-half-his-fortune-to-charity.php (“India has 52 billionaires and more than 125,000 millionaires. According to a study by the global consulting firm Bain & Company, India's giving in 2006 totaled close to $5 billion, which translates into an estimated $7.5 billion in 2009. This is only 0.6 percent of India's GDP. By contrast, Americans gave more than $307.75 billion or around 2 percent of GDP to charity in 2009, in spite of the recession.”).
\end{itemize}
Magazine recently noted that the “pressure to give is building up on
India’s wealthy, who have seen their fortunes soar in recent years.” Aside
from the wealth brought to the country by multinational corporations,
India is now home to fifty-five billionaires, made wealthy by the rise of
global trade and an influx of foreign capital. Although some companies
like the Tata Group and Infosys, as well as certain high-profile
multinationals like IBM, have a solid history of contributing to India’s
development and social welfare, many companies have stubbornly
refused to contribute more than is minimally required.

Gates, unlike other successful capitalists, expresses no skepticism
regarding the government’s ability to harness philanthropy. He believes
that governments and companies can work together to eradicate poverty.
Still, to many, he represents the power and promise of voluntary corporate
social responsibility. As such, some of India’s corporate elite took the visit
as an opportunity to criticize the mandatory CSR proposal. The existence
of men like Gates, they claimed, proved that CSR does not need to be
mandatory. The market, as Adam Smith predicted, will produce innovators
who will find ways to make capitalism work for even the world’s
poorest. Many writers, bloggers, and NGOs who generally support CSR
view India’s proposal as an anomaly. CSR, they contend, is voluntary by
nature. The vast majority of scholars writing on CSR perceive it as an
issue for companies or international organizations to address—not as a
state-driven initiative. Anything state-mandated is something different
from CSR, such as a government regulation or a tax, bound to make India
less enticing to foreign investors and large national companies alike.
Accordingly, India Inc. has been lobbying the government to scrap the
mandatory spending proposal. And after Gates’s visit, the government did

14 See Karmali, supra note 1.
15 See id.
17 See 2% CSR Spend on Cards for India Inc., supra note 13.
19 See id.
scrap the proposal, at least tentatively. Spending, the Ministry said, would be encouraged but not mandated, although reporting would be required. For a long time, it seemed that India Inc. and the traditional notion of CSR had prevailed.

Recently, however, the Ministry had a change of heart. Almost defiantly, it decided to stick to its original mandatory CSR proposal, despite a host of criticism from companies and CSR experts alike. Very few clauses in the bill, which is now dubbed the 2011 Companies Bill, remain to be debated, and the government is hoping to re-introduce and pass the bill during the Spring 2012 budget session.

India’s proposed mandatory CSR spending—an anomaly indeed in the world of CSR—raises a host of pressing questions about the future of corporate responsibility, in India specifically and in developing countries generally. The debate in India is set to continue as the bill works its way through Parliament. Accordingly, this Comment seeks to discover how and why India came to endorse such a radical and innovative proposal in the field of corporate social responsibility, as well as what that proposal presages for corporate regulation in other developing nations. As CSR becomes increasingly popular, it seems that other state governments may also seek to harness its power.

This Comment concludes that the proposal, while radical, is in fact a rational response to major tension in the Indian economy, one which is similarly felt in many developing nations. Since the early 1990s, India has been experiencing intense pressure to liberalize its markets, to privatize, and to deregulate. Despite the success of India and other BRICS

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22 Id.


26 See KAUSHIK BASU, INDIA’S EMERGING ECONOMY: PERFORMANCE AND PROSPECTS IN THE 1990s AND BEYOND 83-85 (2004); see also Umakanth Varottil, A Cautionary Tale of the Transplant Effect on Indian Corporate Governance, 21(1) NAT. L. SCH. IND. REV. 1, 6 (2009).
countries.\textsuperscript{27} India is still very much a developing nation and, as such, needs to reinforce state regulatory and social welfare mechanisms. Added to this tension are elements inherent in India’s political makeup and constitution. From its inception, the Indian government pledged to its people that it would promote not only legal but also economic equality,\textsuperscript{28} and a large portion of Indian voters remain both economically disadvantaged and committed to this ideal of equality.\textsuperscript{29} In proposing mandatory corporate social responsibility spending, the Indian government was likely attempting to bridge this divide: to satisfy voters by forcing companies to promote social welfare, and to please companies by avoiding additional taxes while allowing them to benefit from the autonomy of choosing how and where they will support social goods.

Faced with similar pressures, several other nations that liberalized and privatized in the 1990s have become unstable and either have opted to re-nationalize major sectors of their economies or have degenerated into economic and political chaos.\textsuperscript{30} In entertaining this admittedly unorthodox proposal, India may simply be attempting to forge a middle path between extreme liberalism and the resurgence of the regulatory state. Maintaining both growth and stability has proven difficult for many non-Western economies, and in revising its corporate law, India remains anxious to avoid pitfalls that have trapped other nations. Doing so will require innovation; accordingly, international scholars should not be quick to dismiss the prospect of state-based CSR.

This Comment proceeds in five parts. Part I provides background on prominent theories of corporate social responsibility, as well as the major criticisms of CSR in relation to more traditional regulation. Part II lays out the basics of India’s economic history, including the major intervention staged by the International Monetary Fund (“IMF”) in 1991, to illustrate both the recent boom and the perceived need for CSR. Part III follows the progress and debate around India’s new Companies Bill generally, and the mandatory CSR proposal particularly. Part IV examines the efficacy of this proposal in the Indian context, and Part V explores

\textsuperscript{27} The BRICS countries are among the world’s largest and strongest developing economies. As of April 2011, the BRICS coalition included Brazil, Russia, India, China, and South Africa. \textit{See South Africa Joins; BRIC Now BRICS}, \textsc{BusinessWorld}, Feb. 19, 2011, http://www.businessworld.in/bw/2011_02_19_S_Africa_Joins_BRIC_Now_BRICS.html.

\textsuperscript{28} \textit{India Const.} art. 4, § 38, cl. 2 (“The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities . . .”).


whether or not this proposal will likely remain a quirk of Indian legislative history or whether the lessons from the CSR proposal can be applied to other developing countries in their attempt to navigate similar revisions of their corporate legal structure.

I. THEORIES OF CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility has become an increasingly popular—and contentious—field of study since the 1970s, when it began to garner serious scholarly attention. A recent Google search for the term “corporate social responsibility” yielded over twenty-one million hits, and a Westlaw search for the same term returns over two thousand articles. The study and practice of corporate social responsibility appear to be alive and well, as thousands of companies are vying to gain recognition by adopting the CSR label. Since 2000, over 5300 businesses and 130 countries have joined the United Nations’s (“UN”) Global Compact, the largest extant international CSR initiative. The World Bank, OECD, and the International Labor Organization all run similar initiatives with thousands of members.

There can be no doubt that corporate social responsibility has become increasingly popular over the last several decades; nevertheless, many scholars vehemently disagree over its role in economic development and corporate law. Some contend that because CSR is a young and broad field, it is difficult to define exactly what one means by “corporate social responsibility” and hence, it is hard to implement and monitor. Various initiatives, for example, focus on the environment while others focus on labor or human rights.

Traditional corporate law scholars echo Milton Friedman’s cry that the only obligation of a business is to make a profit—not to assist the welfare of developing nations. Others support corporate social responsibility initiatives, for example, focus on the environment while others focus on labor or human rights.


32 WESTLAW, www.westlaw.com (search performed June 1, 2011).


35 See Peter Madsen, Professionals, Business Practitioners, and Prudential Justice, 39 McGEORGE L. REV. 835, 836 (2008) (“Defining CSR is, as the saying goes, like trying to nail Jell-O to the wall.”).

36 See Milton Friedman, The Social Responsibility of Business Is To Increase Its
responsibility and see it as a viable strategy to increase profits or, at the
very least, to mitigate the social risk inherent in foreign investment while
still producing social good. Still other experts take the opposite view of
Friedman: they see CSR as a method of undermining the necessary
regulatory development of impoverished countries and would opt for more
regulation over more corporate giving. Understanding the context of this
global debate is a necessary precursor to evaluating the recent initiative in
India.

A. The Complexity of Defining Corporate Social Responsibility

International corporate social responsibility aims to address the
problem caused by multinational corporate enterprises (“MCEs”) operating in less-developed countries with insufficient regulation. The
services traditionally performed by state regulation, such as ensuring that
companies internalize harmful environmental externalities or follow basic
moral tenets in their labor practices, may instead need to be performed
through international law or codes voluntarily adopted by companies
themselves. Since international law still struggles with issues of
enforcement and legitimacy, many companies have simply crafted their
own codes or signed on to voluntary agreements to indicate to consumers
that they intend to be “socially responsible” wherever they operate. While the codes are essentially unenforceable, the idea is that they will be
ethically binding on the companies and monitored closely by consumers
and NGOs.

Thomas Donaldson characterizes CSR as a global social contract, obliging companies to behave in a morally and socially acceptable manner

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40 See McInerney, supra note 38, at 172-73.

41 See De Koster & Van den Eynde, supra note 34, at 128-34; Herrnstadt, supra note 34, at 196-200.
in exchange for access to the international market. As with any social contract, he posits that we must ask two questions: why does the contract exist, and how can one tell when it has achieved its purpose? For some, the answer revolves around the environment and ensuring that companies avoid imposing negative externalities on ecosystems in developing countries. For others, the answer involves paying workers a living wage, keeping reasonable hours and labor conditions, and respecting the human rights of local stakeholders. For still others, the answer is as broad as being a respectful citizen and re-investing some profits in the local economy or education system. Most scholars envision CSR incorporating all these answers and more. CSR, in its broadest sense, simply asks companies to consider both the social and financial impacts of their decisions. This idea can be encompassed by the term “triple bottom line,” which has become something of a cliché, but at its core exhorts companies to consider social, environmental, and financial outcomes collectively. These debates have gained increasing importance over the last two decades with the expansion of globalization, privatization, and deregulation. Still, prominent scholars disagree over both the form that CSR ought to take and whether or not CSR is even a worthy goal of corporate and international law.

B. CSR as Corporate Irresponsibility

The basic criticism of corporate social responsibility from the right was outlined by Milton Friedman in a famous New York Times Magazine article. The article’s title neatly encapsulates its thesis: “The Social

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42 See THOMAS DONALDSON, CORPORATIONS AND MORALITY 42-54 (1982).
43 Id. at 37.
47 See Kerr, supra note 37, at 834.
48 See Seema G. Sharma, Corporate Social Responsibility in India: An Overview, 43 INT’L LAW. 1515, 1529 (2009) (“‘Triple Bottom Line’ or ‘Triple P’—people, planet and profit’ is the mantra of the day for success.”).
Responsibility of Business is to Increase its Profits.” In its opening lines, Friedman asks and responds to the following question:

What does it mean to say that "business" has responsibilities? Only people have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but "business" as a whole cannot be said to have responsibilities, even in this vague sense. The first step toward clarity in examining the doctrine of the social responsibility of business is to ask precisely what it implies for whom.  

Friedman concludes that the idea of social responsibility means nothing for businesses; in fact, since CSR spending involves managers “taxing” shareholders and spending their money without their consent, it is actually an immoral business practice.

In his subsequent argument, Friedman relies largely on the supposition, articulated later by Frank Easterbrook and Daniel Fishel in The Economic Structure of Corporate Law, that a corporation is nothing but a nexus of contracts.  

These contracts, among other things, generally assume that the managers of the corporation will maximize profits for the company’s shareholders. Given this reality, Fishel claims that corporations are “incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.”

Interestingly, Easterbrook and Fishel’s book is one of the most-cited books in all of legal scholarship written within the last twenty-five years. Friedman’s theories, then, have been quite influential in delineating the purposes of corporations and corporate law.

More recently, distinguished scholars such as Henry Hansmann and Reinier Kraakman have argued that American corporate law, which encodes this duty to maximize profits for shareholders as a manager’s paramount fiduciary duty, has reached an optimally efficient endpoint and represents the ideal for international corporate governance.

Hansmann and Kraakman claim that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term

50 See Friedman, supra note 36, at 33.


53 See GREENFIELD, supra note 38, at 4.

54 See Hansmann & Kraakman, supra note 36, at 468.
They assert that corporate law around the globe is converging around the shareholder-centric norm—not because of path dependence, but due to this model’s unmatched efficiency. Maximizing profits simply provides the largest gains for society as a whole. Jonathan Macey, similarly, argues that non-shareholders have other ways to protect themselves without demanding that companies split their fiduciary duties among multiple constituencies. If workers or local residents want to influence a company’s actions by garnering higher wages or inuring more environmental protections, for example, those workers or residents can sue on their labor contracts or seek recourse in the local political process. Since shareholders do not have these options, the company’s fiduciary duty should run to them—and only to them. It is inefficient to modify this duty by some broad “social contract.” Others add that “social contracts” are vague and immeasurable, unlike profit, and that corporate executives simply have no talent or expertise in spending money to foster social goods.

Despite this seeming consensus, Kent Greenfield contends that, in reality, “[t]here is now more disagreement [in corporate law] than perhaps in any other area of law, and the disagreement is at the very core of this discipline.” Many scholars of corporate law and development alike argue fervently that corporate social responsibility is reconcilable with the key tenets of corporate law, either because CSR helps maximize profits and reduce risk (arguing within Friedman’s framework), or because Friedman’s framework is flawed and corporations ought to be viewed as public, not private, actors. While the former criticisms are perhaps unduly optimistic, the later, if true, could erode some of the underpinnings of liberal corporate theory.

C. Corporate Social Responsibility as an Ideal Lever for Development

Scholars arguing against Friedman’s framework highlight several flaws in his reasoning. Christopher Stone notes that there is no direct promise made by managers to shareholders to operate for the sole purpose of maximizing profit, despite the fiction of exclusive fiduciary duty created by American corporate law. Additionally, if either party to the alleged “promise” did seek profit maximization at any cost, there would be no opportunity for the other party to reject or modify the agreement.

55 Id. at 439.
56 Id. at 468.
57 See Macey, supra note 36, at 23-26.
58 See STONE, supra note 37, at 85-86.
59 See GREENFIELD, supra note 38, at 4.
60 See id. at 154; STONE, supra note 37, at 81.
61 See STONE, supra note 37, at 81.
Such an involuntary and un-negotiated contract could hardly be as absolute as Friedman claims. If there were a promise, though, Stone argues, the promise probably does not entail maximizing profits in every way possible—at the expense of the environment, for example, or human rights. It is unclear, he claims, why a fiduciary duty to shareholders should be both inherent in the role of the company and exclusive of socially responsible spending. Companies may be uniquely situated to contribute to social welfare by maximizing profits and hence expanding the economy for everyone; maximizing profit does not necessarily exclude contributing to social welfare and must, in some instances, give way to ethical necessities.

Some scholars have argued that businesses, in terms of their managerial capabilities and the information they possess, are better situated to foster certain social goods than the government. A business, for instance, is likely in the best position to weigh different methods of preventing environmental harm from its own manufacturing than a governmental regulatory agency. A business, too, may understand best the kind of education that youth in the community would need to qualify for high-paying jobs within the corporation. Encouraging companies to spend money to minimize externalities above and beyond what environmental law requires, or to spend for the community’s good, allows corporations more autonomy than imposing taxes, and may, in some cases, garner a more optimal result.

Other writers observe that there are serious limitations to regulatory law—limitations that corporate social responsibility is poised to overcome. Regulation, for example, is always reactive. It sanctions harm caused by corporations but only after the fact. Corporations can be more proactive than regulatory agencies; not only can they prevent negative externalities, but they can furnish positive externalities as well.

The law, Stone writes, “seems most appropriate where it is used to enforce acceptable minimums, rather than to force from each person what he is fully capable of.” Rarely are laws aspirational; it would seem odd, for instance, to mandate that companies “build excellent schools” or “be as environmentally conscious as possible.” Not only would governments

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62 See id. at 82.
63 See id. at 84.
64 See id. at 85.
65 See id.
66 See GREENFIELD, supra note 38, at 39.
67 See STONE, supra note 37, at 101.
68 The problem with law, according to Kant and Aquinas, is that it only sets minimum standards. The law tells corporations what not to do, but does not create any impetus for positive, constructive action. See DONALDSON, supra note 42, at 164. By
run into enforcement issues, but legislating around these forms of social goods, such as specifying the type of generator a plant must buy or the dimensions of a school it must build, could lead companies to abdicate the use of their own independent, responsible judgment. Ideally, Stone posits, we want companies to be responsible not merely in the sense of following the rules, but also in the more productive sense of “using autonomy to make moral decisions.” Only in this way can companies build positive reciprocity and trust with both the communities they serve and the governments with which they interface. Moral decisions must be made of the company’s “free will.”

Evidently, many corporate executives believe that spending on corporate social responsibility can engender positive reciprocity, build reputational value, and even lead to additional profit. Even within Friedman’s profit-maximizing framework, then, CSR can be a net good. According to one recent survey, seventy percent of global CEOs indicated that CSR was vital to their companies’ profitability. In another survey, seventy-six percent of CEOs espoused a belief that socially responsible and sustainable spending creates long-term shareholder value. In *The Market for Virtue*, David Vogel catalogues some of the many multinational corporations that have bought into the arguments for corporate social responsibility: Nike now monitors the working conditions in its international manufacturing plants; Ikea banned child labor in India and provides families with educational stipends to keep children in school; Starbucks carries only free-trade coffee; Home Depot will not purchase timber from old-growth forests; and Timberland gives its employees one week off to do local charity work each year. According to one business consultant, “[c]ompanies that take corporate citizenship seriously can

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69 See STONE, supra note 37, at 116.
70 See id.
71 See GREENFIELD, supra note 38, at 39.
74 See VOGEL, supra note 49, at 1-2.
improve their reputations and operational efficiency, while reducing their risk exposure and encouraging loyalty and innovation.’’

It may well be true that CSR can improve a company’s reputation and decrease its risk exposure (after all, even under U.S. law it is well within the scope of a manager’s business judgment and fiduciary duty to invest some funds in social goods) but it appears unlikely that CSR is a strong tool for maximizing profit. While companies that adopt CSR for other reasons may have strong arguments, Vogel claims that there is little evidence that CSR increases profits for most companies. While many studies show a link between profitability and socially responsible programs, these studies have been unable to prove that the correlation is caused by the implementation of CSR—or that profitable firms are not simply more likely to engage in CSR in the first place. CSR may make good business sense for some firms, namely, those that have marketed themselves as sustainable enterprises or large corporations with strong brands and fragile reputations, but not for most. Many of the most socially responsible firms from the 1970s, such as those in the “five percent club” for annual CSR spending relative to profit, like Dayton-Hudson, Cummins Engine, and Control Data, have gone out of business or have been restructured. It is therefore difficult to claim that CSR maximizes profit for the majority of companies either in the short or long term. If we are operating solely within Friedman’s framework, CSR may merely be an expensive distraction; if firms are to commit to social responsibility, it may require alternate incentives or reasoning.

D. Corporate Social Responsibility as a Prophylactic for Regulation

Given that companies have minimal profit incentives to engage in CSR, some scholars speculate that corporate social responsibility is merely a tool to ward off regulation and is a mask for corporate self-interest. Milton Moskowitz once observed, “[L]ooking over the history of corporate social responsibility, I can see it as consisting of [ninety-five] percent rhetoric and five percent action. Companies are adept at drawing up high-sounding mission statements. Changing the way they do business? That’s

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76 See A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (establishing that contributions to the local community violate neither fiduciary duty nor the business judgment rule).

77 See Vogel, supra note 49, at 14, 16-45.

78 See id. at 30-34.

79 See id. at 18.

80 See id. at 2.
something else.”81 Many companies have been accused by NGOs of “greenwashing” their advertising and reports to make their practices look more eco-friendly. The UN, for example, has already removed almost two thousand companies from its Global Compact for non-compliance with its terms.82 By espousing good intentions via CSR, though, corporations buy themselves more time as they attempt to stave off further regulation. Vogel bluntly admits that increased corporate regulation would be preferable to CSR, but corporations are too powerful and will not allow the requisite political changes.83

Accordingly, scholars like Kent Greenfield argue that since major corporations are technically “public,” in that most are publicly listed with stocks that can be purchased by anyone, corporate law should take on a more regulatory bent and serve broader social purposes. Like environmental law and labor law, corporate law should be viewed as “public” law, or “law that concerns society more generally.”84 In the long run, Greenfield doubts the wisdom of a system like CSR that proposes market solutions for market imperfections.85 “[C]orporate law,” he claims, should be “predicated upon our collective political decisions about what we want our society to look like” and not simply on what is most efficient for companies.86 Greenfield contends that most societies would want equality and human dignity to factor into corporate regulation, as they do with all public law.87 Increasing corporate regulation, he contends, would not cast countries into the economic abyss—after all, countries with more regulation than the United States, like Canada, Germany, Holland, and Sweden, are both economically secure and more likely than America to offer their populace a chance at upward mobility and the “American dream.”88

This leftist critique of CSR claims that further regulating corporations would not violate any a priori economic “right.”89 To argue that corporations have a right to be free of regulation seems *Lochnerian*

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83 See Vogel, supra note 49, at 10.

84 See Greenfield, supra note 38, at 2.

85 See id. at 38.

86 See id. at 37.

87 See id. at 38.

88 See id. at 157.

89 See id. at 33-36.
and retrograde.\textsuperscript{90} Since the government offers corporations many necessary “goods,” such as state-sponsored legal recognition as well as the ability to own or lease resources and hire employees, businesses ought to be obliged to furnish something in return, beyond profits for shareholders.\textsuperscript{91} CSR, these scholars argue, does not go far enough in supporting the development of regulatory systems abroad; rather, it may undermine developing countries’ fledging efforts at regulation.\textsuperscript{92}

Critics on the left and the right, as well as genuine CSR enthusiasts, still might be puzzled, however, by India’s Companies Bill. It is unclear if the bill is intended to be regulation, like an additional tax with informal monitoring mechanisms, or if it is “voluntary” enough to qualify as CSR. If it were regulation, then the enforcement mechanism would remain murky and the spending would not go to democratically determined priorities, but rather to what the business prefers to purchase. If it were more like voluntary CSR, then the companies would seem unduly constrained, and the reciprocal goodwill normally engendered by giving freely could be compromised by the state’s duress. So what is India’s proposal under the 2011 Bill: CSR or regulation? To answer this question, it will be helpful to first understand how India came to endorse such a strange hybrid of volunteerism and regulation.

II. INDIA’S REGULATORY HISTORY: TRANSPANTING CORPORATE LAW

India’s current system of corporate governance is something of a hybrid. Like many post-colonial countries, when India first gained its independence in 1947, it opted for a socialist governance structure with many industries and enterprises controlled by the state.\textsuperscript{93} In 1991, however, India experienced a massive financial crisis. The IMF agreed to grant India the loans it needed if it would liberalize its economy and privatize most sectors.\textsuperscript{94} Since then, India’s economy has been growing at a rapid pace. To facilitate foreign direct investment, India has lifted most of its recently enacted corporate law from liberal American and British models.\textsuperscript{95} The economy is now functionally capitalist, although the constitution remains socialist.\textsuperscript{96} It is largely this divide between a

\textsuperscript{90} See id.

\textsuperscript{91} See DONALDSON, supra note 42, at 43, 54-56.

\textsuperscript{92} See McInerney, supra note 38, at 172-73.

\textsuperscript{93} See MENJOR SINGH, ECONOMICS REFORMS IN INDIA: PROBLEMS AND PROSPECTS, 1-4 (2001).


\textsuperscript{95} See Varotttil, supra note 26, at 20-21.

\textsuperscript{96} See Edward A. Gargan, India Stumbles in Rush to a Free Market Economy,
developing, once-socialist country with an impoverished populace and its booming, capitalistic aspirations that the 2011 Companies Bill attempts to navigate.

A. Early Indian Corporate Law and the Rise of the IMF

India remains a very young economy. According to Indian corporate scholar Umakanth Varottil, India has undergone only two major economic eras since it became an independent country in 1947.\(^\text{97}\) The pre-1991 era was characterized by regulation, state enterprise, and Keynesian economics.\(^\text{98}\) For the first decade of its independence, India largely functioned via the corporate law it had inherited from the British, which was later replaced by the passage of the Companies Act in 1956. That Act remains the key body of corporate legislation to this day.\(^\text{99}\) Due to its quota system and cumbersome licensing scheme, most sectors remained state-run until 1991, with a handful of large, family-owned corporations operating alongside state enterprises.\(^\text{100}\) Growth was mostly fostered through central planning via a series of government-authored five-year plans.\(^\text{101}\)

These socialist and protectionist tendencies were rejected in 1991, as India embarked on a program of systemic liberalization, privatization, and globalization as per its agreement with the IMF.\(^\text{102}\) Like many developing countries in the early 1990s, India found itself struggling with a stagnant economy, inflation, and, in particular, a balance of payments crisis.\(^\text{103}\) By 1991, the government’s debt was over half of India’s GDP, and India could no longer obtain credit from its foreign counterparts.\(^\text{104}\) After realizing that it could finance no more than a few weeks’ worth of imports and was in imminent danger of defaulting on its debt, the

\(^{97}\) See Varottil, supra note 26, at 5.

\(^{98}\) See Singh, supra note 93, at 1-4; see also Dharma Kumar, Tapan Raychaudhuri & Meghnad Desai, The Cambridge Economic History of India 947-94 (1971).

\(^{99}\) See Singh, supra note 93, at 1-4.

\(^{100}\) See id.

\(^{101}\) See Kumar, Raychaudhuri & Desai, supra note 98, at 947-94.

\(^{102}\) See Singh, supra note 93, at 1-29.


government declared a financial crisis and agreed to pledge sixty-seven tons of gold to secure an IMF loan.\textsuperscript{105} The majority of this stock of gold was airlifted to the Bank of England to secure the debt.\textsuperscript{106}

Since the IMF’s intervention, according to OECD, “[s]tate intervention and control over economic activity has been reduced significantly and the role of private sector entrepreneurship increased.”\textsuperscript{107} With the rise of foreign investment, India adopted a more Western approach to corporate law. In 1991, the government adopted a package of reforms known as the New Economic Policy, including an IMF and World Bank-endorsed Structural Adjustment Program.\textsuperscript{108} These adjustments brought Indian corporate law more in line with that of the United States by abolishing most licensing restrictions and easing burdens on private enterprise and trade.\textsuperscript{109} In 1992, India created the Securities and Exchange Board of India (“SEBI”) to be a regulatory body akin to the American Securities and Exchange Commission (“SEC”).\textsuperscript{110} In 2000, industry, lead by the head of the Birla Group, proposed and SEBI adopted a major change to its boilerplate Listing Agreement.\textsuperscript{111} Clause 49, modeled after several aspects of U.S. and U.K. securities law, introduced several more Western corporate practices into Indian law, including the notion of the independent board member and audit committee.\textsuperscript{112}

Professor Varottil classifies many of India’s corporate legal reforms as “legal transplants,”\textsuperscript{113} that is, transplants from foreign law that have been successful in reviving the Indian economy, but which may not uniformly be well adapted to the Indian context.\textsuperscript{114} This eagerness to transplant foreign corporate law likely resulted from increased participation by India in the global market. Many Indian stocks are now

\textsuperscript{105} See McGillivary, supra note 94; SINGH, supra note 93, at 3.


\textsuperscript{108} See SINGH, supra note 93, at 5.

\textsuperscript{109} See id. at 20.

\textsuperscript{110} See Varottil, supra note 26, at 6.

\textsuperscript{111} See id.

\textsuperscript{112} See id.

\textsuperscript{113} A legal transplant involves the adoption by one country of laws or legal concepts from another country. See id. at 20-25. See also Hideki Kanda & Curtis Milhaupt, Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law, 51 AM. J. COMP. L. 887 (2003); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, The Transplant Effect, 51 AM. J. COMP. L. 163 (2003).

\textsuperscript{114} See Varottil, supra note 26, at 20-25.
issued as Global Depository Receipts ("GDRs"). In 1999, Infosys, one of India’s largest companies and a leader in Indian CSR, even issued stock in American Depository Receipts and listed itself on NASDAQ, hence exposing itself to the full panoply of SEC regulations.\footnote{See id. at 9-10.} It is only logical, then, that Indian companies exposed to the rigor and specificity of U.S. regulations would want to impose those same burdens—but no more—on their Indian competitors, regardless of the logic of applying U.S. or U.K. regulations in the Indian context.

The adoption of these reforms and the subsequent uptick in the Indian stock market seem to indicate the signaling power of foreign corporate law to Western markets.\footnote{See id. at 25.} The more Western the legal regime, the safer and simpler investments may seem. The Indian government is no doubt aware of this phenomenon. Since 1991, the economy has steadily been growing; the government likes to claim that India “is shining,” in no small part as a result of two decades of legal reforms that helped to attract foreign investment.\footnote{See India’s Shining Hopes, THE ECONOMIST, Feb 19, 2004, http://www.economist.com/node/2423065?story_id=2423065.}

OCED observes that India’s “annual growth in GDP per capita has accelerated from just 1¼ per cent in the three decades after Independence to 7½ per cent currently, a rate of growth that will double average income in a decade . . . . India is now the third largest economy in the world.”\footnote{See OECD, supra note 107.} Per capita GDP still hovers around $3000, though, and over twenty percent of Indians still live in crushing poverty.\footnote{See id.; India GDP - Per Capita (PPP), INDEX MUNDI, http://www.indexmundi.com/india/gdp_per_capita_(ppp).html (last visited May 24, 2011).} As a result, India is eager to continue its fast-paced economic growth. In a competitive global market, India may be anxious about adopting legal reforms that are not legal transplants. Wary of scaring away would-be investors, the modus operandi seems to be matching without exceeding the sweep of U.S. and U.K. regulation.\footnote{See The Companies Bill (Proposed), 2009, No. 59, Lok Sabha, “Statement of Objects and Reasons” at 190, available at http://www.icai.org/resource_file/17166companies_bill_2009.pdf.}

B. India’s Constitution and the Persistence of Inequality

Although it is now a capitalist society in practice, insofar as its constitution is concerned, India remains a socialist democratic republic, committed to furthering equity.\footnote{INDIA CONST. art. 4, § 38, cl. 2 (“The State shall, in particular, strive to}
threat to the national government, remains moderately popular in some Indian states. In 2004, the ruling coalition, headed by the center-right Bharatiya Janata Party (“BJP”), was shocked by the number of seats it lost in elections despite its contribution to India’s overall growth through liberal economic reforms. Subsequently, the new leading coalition, headed by the center-left Indian National Congress, needed the support of the Communist party to solidify its power. This alliance resulted in a budget passed in 2005 that greatly increased state spending on social welfare and aid to the poor. The budget “earmarked $5.7 billion for a series of programs aimed at bolstering education, infrastructure, housing, nutrition and health care, especially in India's villages, where the bulk of poor Indians reside.” Despite the success of economic liberalism in India, it appears that, in light of persistent poverty and wealth disparities, the interventionist ethos has not entirely disappeared.

C. Corporate Missteps and Government Responses: From Bhopal to Dabhol and Beyond

Several famous environmental and human-rights-related disasters have accompanied foreign investment and liberalization in India—incidents that have made the public think twice about welcoming further investment and enterprise without imposing any additional regulations or obligations. These incidents, principally the public health disaster at Bhopal and the human rights fiasco at Dabhol, form the backdrop for any discussion of corporate social responsibility in India.

The Bhopal incident took place in December of 1984, although as recently as May of 2011, India’s Supreme Court issued an opinion upholding the resolution of the case in response to continued protests over the “lenient” punishment the company’s executives received. On the morning of December 3, 1984, a leak of methyl isocyanate gas from a tank in Union Carbide’s pesticide plant in Bhopal spread a toxic cloud over several miles surrounding the company’s urban industrial complex.

minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities . . . ”).

122 See Adiga, supra note 29.
123 See id.
124 See id.
125 Id.
Since the gas was highly toxic, the leak killed around 3,000 residents of the Madhya Pradesh state in its immediate aftermath; the long-term death toll is estimated at 20,000, with as many as 100,000 more suffering from crippling disabilities.\footnote{128 See Adrienne Margolis, \textit{Prioritising Profit Over People}, 64\textit{(1)} \textit{INT’L BAR NEWS} 23 (2010).} The victims and their advocates allege that the disaster took place because India’s Union Carbide subsidiary was storing large amounts of ultra-hazardous waste in bulk without the proper safety precautions or even a suitable emergency plan.\footnote{129 See \textit{AMNESTY INTERNATIONAL, CLOUDS OF INJUSTICE: BHOPAL DISASTER 20 YEARS ON} 4 (2002), \textit{available at} http://www.amnesty.org/en/library/asset/ASA20/015/2004/en/fa14a821-d584-11dd-bb24-1fb85fe8fa05/asa200152004en.pdf.} Union Carbide eventually agreed to pay a $470 million settlement to the Indian government in 1989, although American executives continually refused to appear before Indian courts for criminal proceedings.\footnote{130 See \textit{id. at 1.}} The decision was appealed but made final in 1991.\footnote{131 Union Carbide, \textit{Chronology}, \textit{BHOPAL INFORMATION CENTER}, http://www.bhopal.com/chrono.htm (last visited May 23, 2011).}

Victims of the disaster remain unsatisfied with the legal outcome for several reasons. Not only did many of the proceedings drag on for years or even decades, but an Amnesty International report from 2004 alleges that nearly “30\% of claims for injuries have been rejected . . . around 16,000 claims [remained] outstanding, and most of the successful applicants . . . received minimal amounts of compensation.”\footnote{132 See \textit{AMNESTY INTERNATIONAL, supra note 129, at 1.}} The jail sentences for the seven Indian executives involved—two years being the maximum for criminal negligence in India—seem vanishingly small, and no foreign executive will ever be called to account.\footnote{133 See Kelly Ni, \textit{supra note 126.}} Again, according to Amnesty, “[t]he plant site has still not been cleaned up, so toxic wastes continue to pollute the environment and contaminate water that surrounding communities rely on.”\footnote{134 See \textit{AMNESTY INTERNATIONAL, supra note 129, at 1.}} Despite the quarter-century long duration of the disaster, many of the questions Bhopal raised about environmental responsibility and corporate accountability remain unresolved.\footnote{135 See Jamie Cassels, \textit{Outlaws: Multinational Corporations and Catastrophic Law}, Speech at the Cordell Hull Speakers Forum at the Cumberland School of Law (Nov. 2, 2000) in 31 \textit{CUMB. L. REV.} 311, 318 (2000).}

Ten years later, in 1993, Enron agreed to contract with the state government of Maharashtra to build a multimillion-dollar power plant in Dabhol; at the time, India was only able to provide power for five percent
of its population. The plant was set to be the largest Foreign Direct Investment in India at the time. Maharashtra initially negotiated the contract directly with Enron and its partners, General Electric and Bechtel, and kept the details secret, allegedly because the power situation posed a statewide emergency. When the Indian public finally learned about the deal, however, there was massive protesting over handing foreign companies such a profitable venture rather than using local labor. The BJP party made shutting the project down its major platform in Maharashtra, calling the project neo-colonial and the product of corruption. They claimed the project would cause the price of electricity to soar.

While the deal was eventually renegotiated, the rest of the plant’s history was similarly vexed. Westerners saw the renegotiation as an act of confiscation and threatened to pull other projects from India. Locals, meanwhile, continued to protest the plant. When Enron hired local police to protect the project, there were widespread reports of human rights abuses. According to one account, the wife of a prominent protestor was “dragged . . . naked out into the street” and beat with batons; she was three months pregnant at the time. In addition, 180 peaceful protestors were allegedly beaten and arrested outside the company’s gates. As the turn of the century approached, the price of fuel for the plant soared, and the Maharashtra government was unable to pay the required price for electricity. Enron sued on their contract, but the company, in the midst of its own scandal in the United States, had to declare bankruptcy in 2001 before the lawsuit reached a resolution. The Dabhol plant was subsequently bought by the state in an effort to save the project.

In the wake of the Enron disaster, Western companies have become more wary of the social and political risks involved with investment in India. The Indian public, too, is on guard and remains suspicious of major American investment. Still, Dabhol and Bhopal have not prevented


137 See id.

138 See AMY CHUA, WORLD ON FIRE HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 253 (2003).

139 See id.

140 See id.


142 See id.

143 See id.

144 See id.

145 See id.
major companies like IBM and Coca-Cola from setting up operations in India.\textsuperscript{146} Both companies, however, maintain robust CSR initiatives as a form of social insurance, and India was careful to revise relevant law in the wake of the Enron crisis to regain some patina of regulatory legitimacy.\textsuperscript{147}

### III. THE PATH TO AND FROM MANDATORY CSR

The 2009 Companies Bill and its 2011 counterpart represent the first major effort at comprehensively overhauling corporate law in India since 1956.\textsuperscript{148} It will be landmark legislation for a BRICS country, and the Indian legislature hopes that the Bill will pass through Parliament during the budget session in Spring 2012.\textsuperscript{149} As one might expect, the entire project is proceeding in the shadow of ever-growing foreign investment in India. The Bill’s “Statement of Objects and Reasons” dwells on growth and international investment at some length;\textsuperscript{150} its authors seem painfully eager to impress the global business community. At the same time, the Bill proceeds in the wake of Bhopal and Dahbol, as well as the more recent Satyam accounting scandal (akin to an Indian version of Enron).\textsuperscript{151}

Despite India’s current left-leaning government, the bill is extremely economically liberal and pro-business. Much of it, as might be expected, imports additional legal structures from the West.\textsuperscript{152} The mandatory CSR proposal, then, seems something of a regulatory oddity, inserted by the finance committee after reviewing the Bill and adopted enthusiastically by a fledgling Minister of Corporate Affairs.\textsuperscript{153} As one of

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\textsuperscript{146} See CHUA, supra note 138, at 254.

\textsuperscript{147} See Varottil, supra note 26, at 7.


\textsuperscript{152} See Varottil, supra note 26, at 20-25.

the few elements about the Bill that is uniquely Indian, its inception and context deserve some examination.

A. *Overhaul of Indian Corporate Law*

The proposed Companies Bill has been in the works for some time, dating back as early as 1993. The media has portrayed the Bill as an attempt to “update the laws in accordance with the best global practices”; in other words, the bill largely promises more economic liberalization along with increased protections against fraud.\(^{154}\)

The rationale accompanying the Bill displays Parliament’s eagerness to recruit additional foreign investment. Western investors are clearly the intended audience for several sections of the text. For example, the Bill observes that:

> The expansion and growth of the Indian economy has . . . generated considerable interest in the international investing community. However, there is a need for sustaining growth in a globalized and competitive environment. The increasing options and avenues for international business, trade and capital flows have made it imperative for the growing Indian economy to not only harness its entrepreneurial and economic resources efficiently but also to be competitive in attracting investment to sustain the impressive growth recorded by it in recent years. Many investors are also looking towards the statutory and regulatory framework for the corporate sector in the country while deciding on their investment options.\(^{155}\)

In reauthorizing the bill, then, the major objectives were the reduction of investment risk and transactions costs as well as the attainment of uniformity with much of Western law. Yet it is difficult, as a country battling with poverty and inequality, to absorb so many costs and risks without asking for anything in return.

The Lok Sabha’s legislative brief for the Bill highlights several major changes proposed in the Bill to achieve its liberalizing goals, as well as a few concessions in favor of the Indian people. The major aims of the Bill are to decrease regulation and to shift the onus of oversight onto shareholders.\(^{156}\) The Bill makes some effort to address corporate


\(^{156}\) See PRS Center for Research, supra note 148, at 1.
governance in general through Western mechanisms such as formal, impartial audits and an increased number of independent directors on boards. The Bill, however, also allows shareholders to band together and file class action lawsuits, as this kind of tort framework is currently unavailable in India, and it establishes a National Company Law Tribunal to expeditiously handle these corporate lawsuits. It is, perhaps, worth noting that class action lawsuits will generally only be available to shareholders—not to the average Indian—and that companies themselves have long advocated for a more expeditious corporate law system, as it would reduce the uncertainty inherent in international litigation. The Bill, then, may be even more pro-business than it seems at first glance.

B. The Specter of Mandatory CSR

The changes listed in the previous Section were the major legal revisions laid out by the original Bill, as proposed by the Ministry of Corporate Affairs. The Bill then went to India’s Finance Committee for review before being reported to Parliament. The Finance Committee, perhaps realizing the popular backlash that might result from such an unabashedly pro-business bill, inserted several new clauses to make the bill slightly more pro-development. The proposal mandating two percent CSR spending was among these clauses.

The original proposal required moderate-sized and large companies to set aside two percent of their profit margin averaged over the past three years on socially responsible expenditures. The proposal gave no guidance as to what “corporate social responsibility” meant in the context of the Bill, and provided no enforcement mechanism other than mandated reporting:

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157 See id.

158 See id.


160 See generally Standing Committee on Finance, supra note 9 (adding language to ensure corporate social responsibility and to create accountability to non-shareholder stakeholders).

In response to the Committee’s overwhelming concerns on the extent of Corporate Social Responsibility (CSR) being undertaken by corporates and the need for a comprehensive CSR policy, the Ministry of Corporate Affairs have agreed that the Bill may now include provisions to mandate that every company having [(net worth of rupees 500 crore or more, or turnover of rupees 1000 crore or more)] or [a net profit of rupees 5 crore or more during a year] shall be required to formulate a CSR Policy to ensure that every year at least 2% of its average net profits during the three immediately preceding financial years shall be spent on CSR activities as may be approved and specified by the company. The directors shall be required to make suitable disclosures in this regard in their report to members.\textsuperscript{162}

The Finance Committee provided some context for the proposal. They commented that “[c]orporates have to function as economic persons within the Union of India in a manner that contributes to the social and economic wellbeing of the country as a whole, and as such must be subject to the laws pronounced by the Parliament for the welfare of its citizens.”\textsuperscript{163} The Committee, in other words, wanted some assurance that corporations would be held legally accountable for contributing to communities and spreading their wealth.

The Minister of Corporate Affairs, who, by 2011, was Murli Deora (having replaced the Bill’s author, Salman Khurshid, as the Bill moved through the Committee), commented during hearings that the Ministry had taken a “considered view” on the topic of CSR and had opted for a mandatory expenditure monitored entirely via public disclosure.\textsuperscript{164} The Ministry wanted shareholders to be engaged in determining how to expend the CSR funds and envisioned a system in which each industry would contribute in a manner commensurate with their expertise. Chemical companies, for example, might undertake environmental initiatives, while IT companies could further technology education.\textsuperscript{165} The Minister acknowledged readily that this was “the first time and historically it may be the first time in the world” that a country considered mandating expenditures for the public good, rather than simply taxing companies or leaving them to their own devices.\textsuperscript{166} He also acknowledged that there was an “argument as to whether . . . the Government should mandate

\textsuperscript{162} See Standing Committee on Finance, supra note 9, at cl. 49.

\textsuperscript{163} Id. at cl. 120(9.45).

\textsuperscript{164} See id.

\textsuperscript{165} See Vijayaraghavan, supra note 161.

\textsuperscript{166} See Standing Committee on Finance, supra note 9, at cl. 120(9.45).
anything,” but the Ministry, at least initially, enthusiastically adopted the Committee’s mandatory proposal.\textsuperscript{167}

C. \textit{Corporate Backlash}

While the Minister of Corporate Affairs indicated that some executives were supportive of the two percent mandate, most of India Inc. was immediately up in arms.\textsuperscript{168} The Confederation of Indian Industry asserted, "The law should not specify any amount to be spent on CSR activities. It should be left to the decision of the board."\textsuperscript{169} Other companies echoed that sentiment, claiming that “making CSR mandatory takes away from its core principles . . . . [W]hat companies spend on community welfare, education, health, development and environmental activism is for them to decide.”\textsuperscript{170} Infosys Technologies CEO Kris Gopalakrishnan, the Managing Director of Sonata Software B. Ramaswamy, Wipro Chairman Azim Premji, and Piramal Group Chairman Ajay Pirama, all openly spoke out against the measure.\textsuperscript{171} Pirama commented, “I don't think [CSR] needs to be mandatory. But I do think we should encourage people. Most people today are living better lives than what their forefathers did. So, I think we should encourage philanthropy but I don't think it should be mandatory.”\textsuperscript{172}

The CEOs, while applying immense political pressure to the Ministry, assured the press that CSR spending remained a goal for India Inc. and that they each supported voluntary philanthropy.\textsuperscript{173} Voluntary CSR in India, however, has a mixed track record at best. In 2006, despite its economic boom, India spent only $5 billion, or 0.6 percent of its GDP

\textsuperscript{167} Id.

\textsuperscript{168} See 2% CSR Spend on Cards for India Inc, surpa note 153 (“Industry bodies have been making representations against the proposal to the ministry.”); Companies Law Set To Mandate 2% CSR Spend, TIMES OF INDIA, Feb. 10, 2011, http://articles.timesofindia.indiatimes.com/2011-02-10/india/28545097_1 csr-companies-bill-coal-ministry (“[C]orporates and industry chambers had lobbied hard against the move . . . .”).

\textsuperscript{169} See 2% CSR Spend on Cards for India Inc, surpa note 153.


\textsuperscript{172} Gates, Buffett Meet Indian Billionaires, India Inc Against Mandatory CSR, supra note 18.

\textsuperscript{173} See supra notes 168-172 and accompanying text.
on corporate responsibility.\textsuperscript{174} By contrast, Americans give about $307.75 billion, or about two percent of GDP, to charity annually.\textsuperscript{175} The Indian government has become increasingly frustrated with India Inc. on this front and has been applying steady pressure to prompt companies to give back to impoverished communities. In 2009, they issued voluntary guidelines suggesting the same two percent expenditure, but CSR spending has not seen sufficient movement since then.\textsuperscript{176} While some big names in Indian business, such as Premji, have made large contributions to CSR, the majority of companies have not followed suit.\textsuperscript{177} Many companies claim to have CSR policies in place: eighty percent of the private multinationals and half of the private national companies in India.\textsuperscript{178} Yet most organizations cannot or will not report exactly how much they spend on CSR.\textsuperscript{179} They claim that there is no relationship between their profits and CSR, and that the board has a right to determine CSR spending on an ad hoc basis.\textsuperscript{180}

Nevertheless, it seemed that the Ministry intended to cave in to industry demands; disclosure was to be mandatory, but two percent spending would remain an aspirational goal.\textsuperscript{181} The Ministry intended to "invoke the spirit of corporate philanthropy as a matter of intent rather than as legislation."\textsuperscript{182} One of the few unique elements of India’s Bill, then, was to be excised from the newest draft.

Then, inexplicably, the Ministry dug in its heels and retained the clause when it introduced the 2011 version of the Bill, causing further criticism.\textsuperscript{183} Some concessions were made, such as altering the language of the Bill to stipulate that companies “shall make every endeavour to ensure that the company spends, in every financial year, at least two per cent” of its profits.\textsuperscript{184} While this language does not make CSR mandatory,

\textsuperscript{174} See Sundaram, supra note 13.
\textsuperscript{175} See id.
\textsuperscript{177} The billionaire Premji recently transferred $2 billion into a charitable trust. See Sundaram, supra note 13.
\textsuperscript{178} TIMES FOUNDATION, supra note 16, at 12.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See Vijayaraghavan, supra note 20.
\textsuperscript{182} Id.
\textsuperscript{183} See supra notes 23-24 and accompanying text.
it is much stronger than experts expected. In addition, the Bill now requires the boards of moderate-sized and large companies to convene a Corporate Social Responsibility Committee and to approve a Corporate Social Responsibility Policy.\textsuperscript{185} This policy must be disclosed and posted on the company’s website.\textsuperscript{186} The Bill even gives some guidance as to what constitutes CSR, although the definition remains broad. Schedule VII of the Bill lists several possible genres of CSR expenditure, ranging from “eradicating extreme hunger and poverty” to “promotion of education” to “ensuring environmental sustainability.”\textsuperscript{187} While the media expects the Bill to pass in the 2012 budget session, the CSR section remains controversial, and its fate is still uncertain.\textsuperscript{188}

The question hence remains: should the CSR provision become law, given the cascade of criticism from companies and CSR experts alike? India’s proposal, while unusual, could be viewed as a reasonable effort at furthering development and equality while avoiding imposing additional “taxes” as such. Although the proposal could be an enforcement nightmare, industry has consistently trammelled regulatory innovation in India and other developing countries; this proposal would buck that trend. The pressure to further equity, after all, could generate proposals that would be far more damaging to India’s stability than mandatory CSR.

IV. THE EFFICACY OF MANDATORY CSR IN THE INDIAN CONTEXT

The notion of mandatory CSR is exceedingly unusual; Minister Deora is probably correct in guessing that the 2011 Companies Bill marks the first time in the history of corporate social responsibility that a country has seriously considered mandating spending by large companies on social goods. Certainly, the concept does not fit neatly into any of the categories outlined in Part I of this Comment. Friedman would scoff at the idea and would almost certainly term it socialism—but then again, he would say the same of voluntary CSR.\textsuperscript{189} Stone would likely find the proposal incoherent. As Kant and Aquinas observed, it is very difficult to legislate aspirations, and CSR remains an aspirational exercise.\textsuperscript{190} Kent Greenfield or Thomas McInerney,\textsuperscript{191} on the other hand, might object that the proposal does not go far enough. Companies have an obligation to give back to society, yes—but perhaps society ought to have more of a democratic say in how that money is spent.

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at Schedule VII.
\textsuperscript{188} See supra notes 23-25 and accompanying text.
\textsuperscript{189} See Friedman, supra note 36, at 33.
\textsuperscript{190} See DONALDSON, supra note 42, at 164.
\textsuperscript{191} See McInerney, supra note 38, at 189-91.
These same theoretical pressures, however, seem to have shaped the Indian proposal from its inception: on the one hand, the proposal acknowledges the realities of the global economy’s liberal economic bent and hence avoids excessive administrative red tape; on the other, it acknowledges the equally pressing necessity of facilitating development and avoiding inflammatory wealth disparities.\(^{192}\) India’s proposal may not be ideal, but it is, in some sense, an innovation born of economic necessity. As such, the unique nature of the proposal and the nuances of the political climate that produced it should not be ignored. The proposal may be the first in a new wave of “creative capitalist” solutions proposed by foreign legislatures to solve the problem of growing inequality in the wake of rapid economic growth.

A. Arguments Against Mandating CSR Spending

There are many objections that could be made to mandatory CSR spending, both theoretical and pragmatic. These arguments fall into two categories: those that argue that mandatory CSR spending goes too far, and those that argue that mandatory CSR spending does not go far enough.

Those, like Friedman, Hannsman, or Macey, who would argue that mandatory CSR spending goes too far, would insist that the proposal creates market inefficiencies that may damage the economy in the long run. India, after all, has been doing quite well under its liberal economic regime. Incredibly, its GDP has been increasing at a rate of almost eight percent per year.\(^{193}\) It is one of the fastest-growing economies in the world, and the rising tide has, to at least some extent, lifted all ships.\(^{194}\) Even the lower classes have benefited from privatization and globalization.\(^{195}\) Although millions of Indians remain in poverty, millions more have broken past the poverty line and are edging closer to a middle-class existence.\(^{196}\)

Perhaps the most salient argument against mandatory spending is that it might put India at a competitive disadvantage in the global marketplace and might slow or reverse the country’s near-miraculous growth. Those who already have little might, contrary to the proposal’s aims, fall farther away from the prospect of a middle-class lifestyle. Even if we were to accept Greenfield’s premise that inequality is a market

\(^{192}\) See generally CHUA, supra note 138 (chronicling some of the more violent results of wealth disparities when combined with ethnic tensions).

\(^{193}\) See OECD, supra note 107.

\(^{194}\) Cf. Sunita Kikeri & John Nellis, An Assessment of Privatization, 19 THE WORLD BANK RESEARCH OBSERVER 87 (arguing that, on the whole, privatization has benefited companies and stakeholders alike).

\(^{195}\) See id.; OECD, supra note 107.

\(^{196}\) See OECD, supra note 107.
imperfection,\(^{197}\) intervening at this early juncture—before a country like India has developed sufficient wealth—might ultimately be counter-productive and may shrink the economy.

Others would contend that the market does require intervention, and quickly. They would argue, perhaps quite rightly, that the proposal is not developed or regulatory enough. Without a coercive enforcement mechanism, it is unlikely that the law would garner sufficient compliance. In addition, the law does not specify in sufficient detail the desired target of CSR spending, so it is unclear exactly what compliance would entail. Since the law is so vague and does not envision any formal review process, it may barely add to the state’s regulatory capacity or legitimacy.\(^{198}\) In other words, “mandatory” CSR could remain largely voluntary. It might be preferable, some would say, to impose a tax so that the government would be actually obtain funding to reform its infrastructure in a systematic and democratic way.

B. Walking the Line Between Economic Freedom and Promoting Development

While India’s hybrid CSR proposal may combine certain flaws of liberal economics with the drawbacks of overt regulation, it could also be viewed as capturing the best aspects of both the voluntary and the developmentalist approaches to CSR. After all, India is still home to the largest concentration of poverty in the world.\(^{199}\) If India is not able to sufficiently aid its poor through tax-driven social welfare programs, then the onus will necessarily fall on companies and private wealth. Moreover, if companies are still able to spend their money directly—rather than being taxed—then they may be able to benefit from the trust and reciprocity that socially responsible spending can engender in communities. Companies may also be able to avoid certain inefficiencies, such as the sheer cost of erecting regulatory mechanisms and the ever-present specter of government corruption and misfeasance.\(^{200}\) If voluntary corporate-based and internationally-driven CSR initiatives have not been successful for India, there seems to be no reason why the state should not intervene.

The major advantage of mandating CSR spending, as opposed to levying additional taxes, would be the preservation of the company’s autonomy in selecting how its funds are used. To some extent, the

\(^{197}\) See GREENFIELD, supra note 38, at 29-39.

\(^{198}\) Cf. McInerney, supra note 38 (arguing that CSR initiatives should aspire to contribute to local regulatory frameworks in developing countries).

\(^{199}\) See Sharma, supra note 48, at 1515.

corporation would be “free” to invest its funds in the community directly or in a local non-profit or national NGO. Companies could use the money to further minimize externalities, beyond the requirements of environmental law, or they could choose to create positive externalities by building schools or providing workers with more comprehensive benefits. Knowing that each corporation might bring two percent of its profits to the community for re-investment, community members might be far more enthusiastic about the potential of industry coming to their neighborhood.

As Tom Tyler and Peter Degoey note, re-investing in communities can build reputational legitimacy, trust, and reciprocity from which companies may ultimately benefit.201 If community members and other stakeholders feel that the company is extending its fiduciary duty to encompass their well being, then they may feel some positive duty to act in the company’s best interest in return.202 Greenfield, for instance, asserts that when workers feel that they are being treated with respect and fairness, they require less monitoring to elicit their best efforts.203 The reduction in monitoring costs may ultimately reduce overhead and create a better work environment. Similarly, local residents who have been treated well by the company—educated in its school or nursed in its hospital—are less likely to organize protests and create extra costs when and if the company does make a mistake.

Companies in India, perhaps because of incidents like Bhopal and Dabhol, already seem eager, when they do engage in CSR spending, to create positive externalities that would be recognized and appreciated by the local community. Most companies that have CSR programs (around fifty-six percent) spend their money locally.204 The vast majority invest in education (eighty-two percent) or health (eighty-one percent).205 Spending on the environment is also popular.206 It seems odd, however, that environmental spending does not rank higher given the Bhopal incident and the fact that environmental disasters can have such terrible reputational and fiscal consequences. Schools and hospitals, however, may simply engender more recognition, reciprocity, and good-will in communities since they are much more visible than the efforts a company

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202 See GREENFIELD, supra note 38, at 162.

203 See id. at 164.

204 See TIMES FOUNDATION, supra note 16, at 12.

205 See id.

206 See id.
takes to prevent negative externalities. In the end, companies may find this
trust and good-will more valuable than traditional risk-prevention.

Additionally, companies may invest their money more efficiently
than the government would, and in ways that will inure to their long-term
benefit. An explanation for the prominence of education spending, for
example, may be that investing in schools promises to have direct returns
for the company. A more educated local workforce is certainly a boon to
any industry, especially the information technology sector, which
continues to grow in India. Given the level of corruption that persists in
many developing countries, corporations may actually produce more
impactful public goods than governments at a lower cost.

Donaldson might argue that the mandatory CSR policy “forces”
companies to be free. That is, CEOs may be genuine when they claim
that they want to spend in a socially responsible manner. The pressures of
the market, however, may prevent them from doing so. After all, although
Vogel contends that CSR does not necessarily make companies less
profitable, nor is it particularly likely to make most companies more
profitable. Since CSR involves an up-front investment with uncertain
and difficult-to-measure returns, companies in a highly competitive market
may be driven to reject CSR expenditures, despite their best intentions.
Perhaps, in some sense, the mandate would level the playing field and give
corporations that desire to engage in CSR “permission” to do so. There is
a small chance that companies might not see a mandatory CSR
expenditure as being quite as unpalatable or deterrent as high taxes, since
the company will likely benefit directly, in a calculated way, from its
spending.

The second major argument for mandatory CSR spending—or
something like it—is that countries like India are desperately in need of
funding for development. Hampered by a liberal and competitive global
economy, it is difficult for them to impose steep taxes or comprehensive
regulation. If we believe Greenfield's contention that corporations really
are public enterprises, it makes good sense to require them to contribute to
the public good—primarily by making money, but secondarily by
spending some portion of it on development. Two percent CSR spending
would simply bring India in line with CSR expenditures in the United
States, and the money for development is certainly more desperately
needed in India, where at least one-fifth of citizens live in poverty and

\[ \text{\footnotesize 207 See DONALDSON, supra note 42, at 171.} \]

\[ \text{\footnotesize 208 See id.} \]

\[ \text{\footnotesize 209 See id. at 178.} \]

\[ \text{\footnotesize 210 See VOGEL, supra note 49, at 5, 13.} \]

\[ \text{\footnotesize 211 See Sundaram, supra note 13.} \]
where the public health and education systems are famously dysfunctional.\footnote{121}

India is in an interesting position, one that may be historically and economically unique to the BRICS coalition.\footnote{122} It is a developing country that liberalized quickly and without much fanfare or opportunity for stabilization. Perhaps surprisingly, in contrast to the Soviet Union’s experience with “shock therapy,” India’s economy began to thrive post-privatization and globalization.\footnote{123} Nevertheless, India’s situation is different from that of the United States or United Kingdom, which industrialized much earlier and went through a longer and more productive period of Keynesian development.\footnote{124} As a result, India entered the global marketplace without a particularly robust regulatory infrastructure and without functional state services like schools, highways, or hospitals.\footnote{125} In addition, great inequities existed and persist, since India remains a developing state.\footnote{126}

Globalization has exacerbated many of these difficulties, but the liberal international market and a fear of competitive disadvantage has prevented India from raising corporate taxes considerably or increasing regulation.\footnote{127} Given this context, the mandatory CSR proposal can be read as a product of India’s complex set of economic pressures and tensions. It is one of the few corporate law proposals in the Companies Bill that represents an innovative solution to India’s current economic needs, rather than a legal transplant from a dissimilar economic context.\footnote{128} As such, proponents of CSR and of development may want to encourage India to further develop this proposal and similar initiatives that are responsive to its current circumstances, rather than automatically rejecting ideas that do not fit neatly into pre-established intellectual categories.

V. IMPLICATIONS FOR OTHER DEVELOPING COUNTRIES

While the idea of state-mandated CSR spending remains unique to India, the tensions that necessitated the innovation are not. Many countries around the world are struggling to sustain or enhance their economic growth while addressing deep inequalities. If and when development in the BRICS countries slows, the inequalities still extant in these countries

\footnote{121}{See OECD, supra note 107.}
\footnote{122}{See Varottil, supra note 26, at 15.}
\footnote{123}{See SINGH, supra note 93, at 1-4.}
\footnote{124}{See McInerney, supra note 38, at 176-80.}
\footnote{125}{See SINGH, supra note 93, at 75-108.}
\footnote{126}{See id.}
\footnote{127}{See Adiga, supra note 29.}
\footnote{128}{See Varottil, supra note 26, at 20-22.}
may be laid bare and could become an even greater political liability. Much of Latin America, after all, has recently been destabilized, in no small part motivated by economic inequality and bitterness around globalization and privatization.\textsuperscript{220} Many of these economies have socialized or re-nationalized major industries.\textsuperscript{221} Proactively attempting to address inequality within the market framework may stave off similar brushes with renationalization. Nevertheless, India currently seems to be in a much better position to sustain both growth and stability than many of its Latin American counterparts.

Perhaps scholars and NGOs should encourage these developing countries to entertain audacious and hitherto unthought-of innovations. While not every proposal may be immediately viable, as economies develop and the global climate shifts, hybrid proposals like India’s may become widely practicable solutions. Eventually, the gross inequities in developing nations will need to be addressed; as Bill Gates himself would point out, the market itself is unlikely to eliminate these disparities since markets rarely function for those who cannot pay. Until then, at the very least, each proposal to increase social responsibility may bring governments one step closer to meeting the twin goals of sustaining growth while at the same time addressing troubling inequality.

CONCLUSION

State-driven corporate social responsibility cuts against the thrust of most current CSR practice and scholarship, which generally focus on voluntary business-driven initiatives and international agreements. Nevertheless, as the popularity of CSR surges, more and more national and international players will be seeking to harness the power of corporate-funded investment in social welfare projects. Accordingly, India’s state-based proposal may represent merely the beginning of a new wave of development in the realm of corporate social responsibility. A product of unique historical exigencies, the proposal may represent a new type of solution to an increasingly pressing international problem.

\textsuperscript{220} See Einhorn, \textit{supra} note 30, at 529-33.

\textsuperscript{221} See \textit{id}. 